

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

BLUEWATER MUSIC SERVICES
CORPORATION and BLUEWATER
MUSIC CORPORATION,

Plaintiffs,

v.

SPOTIFY USA INC.,

Defendant.

Case No. 3:17-cv-01051

District Judge Jon Phipps McCalla

Magistrate Judge Jeffery S. Frensley

**DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL**

In support of its Motion for Certification of Interlocutory Appeal (“Motion”), Defendant Spotify USA Inc. (“Spotify”) states:

INTRODUCTION

Spotify files this motion, pursuant to 28 U.S.C. § 1292(b), respectfully requesting that this Court grant Spotify permission to file an interlocutory appeal to the Sixth Circuit of this Court’s Order Denying Motion to Dismiss for Lack of Standing and Failure to State a Claim, issued on September 29, 2018 (hereinafter, the “Order”). Notably, Spotify is not requesting a stay or an amendment to the Order of Trial Settings for Four Spotify Cases (ECF No. 103), which set trial in this case for April 21, 2020; Spotify expects that the requested interlocutory appeal will be resolved well in advance of trial and that no delay will be necessary. *See* UNITED STATES COURTS, JUDICIAL CASELOAD PROFILE (2018), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0630.2018.pdf (noting that the median time for the Sixth

Circuit to resolve an appeal from filing the notice of appeal is 7.8 months). An interlocutory appeal will not delay resolution of this case, and indeed is likely to aid in resolution. And an interlocutory appeal is appropriate here.

This case, at this juncture, presents an important question on which there is no direct Sixth Circuit authority. The question is this: If Plaintiffs need the consent of their publisher-clients to authorize mechanical reproductions at a rate below the statutory rate, and if *anyone* can obtain a mechanical license at the statutory rate *without Plaintiffs' consent* by issuing a Notice of Intention (“NOI”), can Plaintiffs be said to have an *exclusive* right to license with respect to mechanicals and thus have standing? This Court answered this question in its Order as follows: “Without case support that has interpreted this type of right to license as non-exclusive,” Plaintiffs are understood to have “some of the exclusive rights under section 106 that allow standing.” Order at 8-9. But in the absence of any direct guidance on this question, this Court applied a standard that Spotify submits may be overly permissive.

The question of Plaintiffs’ standing presents a pure question of law appropriate for Section 1292(b) certification. Section 1292(b) directs district courts to certify orders for interlocutory appeal when “such order involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation” 28 U.S.C. § 1292(b). Spotify submits that the Court’s Order denying Spotify’s motion to dismiss Plaintiffs’ claims for lack of standing meets these criteria.

There can be no real dispute that the question of Plaintiffs’ standing constitutes a “controlling question of law,” and that an immediate appellate ruling regarding Plaintiffs’ standing would “advance the ultimate termination” of the action. *Id.* The issue of Plaintiffs’

standing is a question of law. The question of standing in this case involves interpretation of contract language, and “[c]ontract interpretation is a question of law” *First Am. Nat'l Bank v. Fidelity & Deposit Co.*, 5 F.3d 982, 984 (6th Cir. 1993) (internal citations removed).

Moreover, this question is “controlling”: this Court concluded that the First Amended Complaint was not subject to dismissal because the Court found that Plaintiffs had standing.

In addition, an immediate appeal from this Court’s Order is very likely to materially advance the ultimate termination of this litigation, at least if Spotify prevails in that appeal. If Spotify prevails in the Sixth Circuit, Plaintiffs will lack standing to pursue copyright infringement claims for more than half of the musical compositions that they allege to be infringed across the four cases that Plaintiffs have filed in this Court. Spotify believes that the parties would be much more likely to settle this case were that to occur, as Spotify continues to believe it should. Moreover, given the schedule for trial in the related cases, and given the average time of disposition currently in the Sixth Circuit, Spotify believes that an immediate appeal will settle the standing claim in ample time for the parties to re-approach settlement before trial.

It is the second of the factors—whether there is substantial ground for difference of opinion on the controlling legal question—that warrants some attention here. Spotify submits that there is indeed substantial ground to think that the Sixth Circuit will conclude that Plaintiffs cannot have an exclusive right to license with respect to mechanicals if anyone can obtain a mechanical license at the statutory rate, without Plaintiffs’ consent, by issuing an NOI. As this Court aptly noted, Spotify did not identify controlling judicial authority that states directly whether the particular language in Plaintiffs’ administration agreements is sufficient to grant Plaintiffs standing to bring the particular copyright infringement claims they plead in their

Amended Complaint. Order at 8. Spotify did not identify controlling judicial authority because there is none on the specific legal question that this case presents regarding Plaintiffs' standing.

Plaintiffs acknowledge that their claims are based in Spotify's alleged failure to obtain "mechanical licenses"—i.e., licenses that authorize the "mechanical" reproduction and distribution of a musical composition in the form of a sound recording. Order at 6. *See also* Am. Compl. at ¶¶ 39, 45, 46, 75, 79. And this means that to bring their claims, Plaintiffs must own, in this case by virtue of an exclusive license, the rights to grant mechanical licenses. It is black-letter copyright law that an exclusive copyright licensee has standing to bring a copyright infringement action only with respect to the particular exclusive right or rights for which it is exclusively licensed. 17 U.S.C. § 501(b); *see also* 3 Melville Nimmer, Nimmer on Copyright § 12.02[B][1] (2018) ("As the owner of an exclusive right under a copyright, an exclusive licensee is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.") (internal quotation marks omitted) (a copy of the pertinent portion is attached to the Motion as Exhibit A); *Dodd, Mead & Co. v. Lilenthal*, 514 F. Supp. 105, 106 (S.D.N.Y. 1981). Having asserted claims based on mechanical reproduction rights, the scope of Plaintiffs' purported exclusive license must include the exclusive right to authorize mechanical reproductions. If Plaintiffs do not possess the exclusive right to authorize mechanical reproductions for the 1,372 works-in-suit that Plaintiffs acknowledge they do not own outright, then Plaintiffs lack standing to bring this suit for these works.

The crucial language on which Plaintiffs rely is contained in the third paragraph of the "exemplar" administration agreement. In particular, the agreement provides that the Administrator has the "sole and exclusive right . . . to execute . . . any and all licenses" including "mechanical" licenses. *See* Ex. A to Plaintiffs' Opposition to Defendant's Motion to Dismiss at

7, ¶ 3 (ECF No. 55-1). However, the administration agreement then imposes a critical restraint. It provides that “[n]otwithstanding anything to the contrary, Administrator may not execute any US mechanical licenses with the exception of licenses which provide for payment of the full statutory rate without the prior written consent of Company.” *Id.*

Spotify submits that when understood in the full context of the Copyright Act provisions that regulate mechanical licensing, this language *does not* convey to Plaintiffs the exclusive right to authorize mechanical reproduction—a right that they must possess to have standing to bring this lawsuit. On the contrary, in Spotify’s view the language makes clear that Plaintiffs lack standing.

Under this language only the copyright owner, and not Plaintiffs, has the authority to authorize mechanical reproductions at a rate below the statutory rate (i.e., the rate established via a process set out in 17 U.S.C. § 115). For this reason, it is beyond dispute that Plaintiffs have no exclusive license to grant mechanical licenses below the statutory rate.

Even more relevantly here, Spotify submits that Plaintiffs do not, and cannot, possess an exclusive right to authorize mechanical reproduction at the statutory rate – and mechanical licenses for which the licensee pays the statutory rate are the specific sort of license alleged to be at issue in this case. To understand why Plaintiffs lack an exclusive right, one must recall that a § 115 mechanical license for which the licensee pays the statutory rate is a *compulsory* license. That is, under § 115 of the Copyright Act, anyone can obtain the authority to make a mechanical reproduction of any non-dramatic musical composition by issuing an NOI and paying the statutory rate to the copyright owner. If this process is followed, the person or entity on whose behalf the NOI is issued possesses a mechanical license, which, again, is made available on a compulsory basis. 17 U.S.C. § 115(b).

These facts have a logical consequence. Plaintiffs cannot claim to possess an exclusive license to make, or to authorize others to make, mechanical reproductions of the works-in-suit at the statutory rate. Spotify, or indeed any other person or entity, may obtain a mechanical license to the works-in-suit at the statutory rate simply by issuing an NOI, without the need to gain approval from or enter into a license with Plaintiffs. *See* 17 U.S.C. § 115; *see also* Paul Goldstein, Goldstein on Copyright § 7.2.1.1 (3d ed., 2018-1 Supp. 2005) (“To obtain a compulsory license, the prospective licensee must serve a notice of his intention to the copyright owner Under section 115(c), the compulsory licensee must pay a royalty The royalty rate, originally specified in the statute, is periodically adjusted by Copyright Royalty Judges”) (a copy of the pertinent portion is attached to the Motion as Exhibit B).

Spotify submits that there is a substantial basis for its views, and

that this substantial ground for disagreement on the specific legal issue of Plaintiffs' standing makes the Court's Order appropriate for interlocutory appeal. Now is the time to seek guidance on this question, which this case presents as a pure question of law.

CONCLUSION

For these reasons, Spotify respectfully moves this Court to certify the Court's Order for interlocutory review under 28 U.S.C. § 1292(b).

December 6, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2018, a copy of the foregoing *DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL* was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

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